Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

No. 77-321

In the Supreme Court of the United States

OCTOBER TERM, 1977

UPPER WEST FORK RIVER WATERSHED ASSOCIATION, by KENNETH PARKER, PRESIDENT, LEWIS COUNTY, WEST VIRGINIA, PETITIONER

v.

CORPS OF ENGINEERS, UNITED STATES ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JAMES W. MOORMAN,
Assistant Attorney General,

JACQUES B. GELIN,
MARYANN WALSH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-321

UPPER WEST FORK RIVER WATERSHED ASSOCIATION, by KENNETH PARKER, PRESIDENT, LEWIS COUNTY, WEST VIRGINIA, PETITIONER

v.

CORPS OF ENGINEERS, UNITED STATES ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 2-4) is unreported. The opinion of the district court (Pet. App. 5-128) is reported at 414 F. Supp. 908.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1977. A petition for rehearing was denied on June 1, 1977. The petition for a writ of certiorari was filed on August 29, 1977. Petitioner asserts that the jurisdiction of this Court is conferred by 28 U.S.C. 2101(c); the correct provision is 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Corps of Engineers' environmental impact statement on the Stonewall Jackson Lake Project complied with the National Environmental Policy Act of 1969.

STATEMENT

The history of the Stonewall Jackson Lake Project is set forth in the district court's opinion (Pet. App. 28-37). In October 1971, the Corps of Engineers filed a final environmental impact statement (EIS) on the project with the Council on Environmental Quality, as required by Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 853, 42 U.S.C. 4332(2)(C). The project, a multi-purpose reservoir on the West Fork River at Brownsville, West Virginia, was designed to provide flood and water-quality control, to increase water supply, and to enhance recreational opportunities. The EIS described the project design, discussed environmental impacts, including unavoidable adverse effects, and considered five alternatives to the proposed action.

Petitioner (Watershed Association), a West Virginia Corporation comprised largely of landowners in the project area, opposed the single-reservoir plan. Instead, petitioner sought the development of a "watershed system"—a series of small dams on the Upper West Fork River and its tributaries. Petitioner brought suit to enjoin construction of the reservoir on the ground, *inter alia,* that the EIS was inadequate because it did not list the watershed system as an alternative.

By agreement of the parties (Pet. App. 11, 106-107), the case was submitted to the district court on cross-motions for summary judgment. Petitioner attached to its supporting depositions a General Design Memorandum

(GDM), prepared by the Corps in January 1971, detailing the costs and benefits of the Stonewall Jackson Reservoir and setting forth the project design (Pet. App. 10-11). The GDM, as well as the EIS, referred to a report completed by the Corps in 1966 and published as a congressional document, S. Doc. No. 109, 89th Cong., 2d Sess. (1966) (Pet. App. 15; App. 12).[1] That report, which was introduced into the record by direction of the district court (Pet. App. 16), extensively reviewed the West Fork Basin Project, considered the feasibility of a small-dam system, and concluded that a series of small dams could not achieve the range of flood control and recreational purposes that would be achieved by the proposed single reservoir (Pet. App. 45-57). The court also had before it a 1975 Review of Environmental Features on the Stonewall Jackson Project, which was prepared by the Corps to update the project plans in the EIS (Pet. App. 16-18).

On the basis of these and other materials, which constituted effectively the administrative record considered by the Secretary of the Army in selecting the multi-purpose reservoir plan, the district court granted summary judgment in favor of the Corps of Engineers. The district court first stated that the posture of the case was proper for summary disposition, since the affidavits filed by the petitioner presented only general and conclusory assertions rather than material facts contradicting representations by the Corps (Pet. App. 18-25). The district court then concluded that the EIS fully comported with the requirements of the NEPA (Pet. App. 92). Specifically, the district court determined that, while a watershed system was a theoretical alternative to the multi-purpose reservoir, it was appropriately omitted

---

[1] "App." refers to the appendix in the court of appeals.

from the EIS because a previous analysis by the Corps had established that it was not a reasonable or realistic alternative (Pet. App. 56-57).

The court of appeals affirmed "for reasons stated in the Memorandum Order of the District Judge" (Pet. App. 4).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with decisions of this Court or of any other court of appeals, and presents no issue warranting further review.

1. Although the NEPA requires that alternatives to proposed action be stated in the EIS, 42 U.S.C. 4332(2)(C)(iii), the courts of appeals have recognized that this requirement must be interpreted by a "rule of reason." Thus, it is sufficient that an EIS encompass all "reasonable alternatives." See, *e.g., Robinson* v. *Knebel,* 550 F. 2d 422, 425-426 (C.A. 8); *Swain* v. *Brinegar,* 517 F. 2d 766, 780 (C.A. 7); *Fayetteville Area Chamber of Commerce* v. *Volpe,* 515 F. 2d 1021, 1027-1028 (C.A. 4), certiorari denied *sub nom. Interstate 95 Committee* v. *Coleman,* 423 U.S. 912; *Sierra Club* v. *Morton,* 510 F. 2d 813, 819 (C.A. 5); *Sierra Club* v. *Stamm,* 507 F. 2d 788, 793 (C.A. 10); *Life of the Land* v. *Brinegar,* 485 F. 2d 460, 472 (C.A. 9), certiorari denied, 416 U.S. 961; *Natural Resources Defense Council, Inc.* v. *Morton,* 458 F. 2d 827, 834 (C.A. D.C.). Here the district court found, and the court of appeals agreed, that the environmental impact statement on this project adequately set forth alternatives to the proposed action. Although petitioner contends (Pet. 41-49) that discussion of a watershed system was essential, the district court found that petitioner "ha[d] not advance[d] anything substantial and dependable to indicate that the watershed idea is a reasonable or realistic alternative for meeting the Congressional objectives outlined above" (Pet. App. 56). There is no need for this Court to review that essentially factual determination.

2. Despite petitioner's contention (Pet. 27-32), disposition by summary judgment was proper. Although petitioner apparently did contest the propriety of a summary judgment for respondents, the district court found (Pet. App. 55) that petitioner had relied on mere assumptions and inferences, rather than substantial facts, in arguing that a watershed system was a feasible and comprehensive alternative to the project. In view of the contrary evidence contained in the pleadings, depositions, and affidavits, with attachments, those unsubstantiated assertions did not create a concrete and material factual dispute. See Rule 56(e), Fed. R. Civ. P. The issues in this case thus remained "clear-cut and simple," and appropriate for summary judgment. *Kennedy* v. *Silas Mason Co.,* 334 U.S. 249, 257.

3. Petitioner contends (Pet. 31-41) that the district court improperly considered the 1966 Report and the Corps' 1975 Review. However, the 1966 Report was introduced into the record by the district court after petitioner itself brought the report to the court's attention. Both the EIS, incorporated as part of the pleadings, and the General Design Memorandum, filed by petitioner (Pet. App. 10-11), referred to the 1966 Report (Pet. App. 15; App. 12). Moreover, as a congressional document, the 1966 study was a matter of public record accessible to petitioner. Thus, consideration of the report was proper and did not prejudice petitioner.

Nor was consideration of the 1975 Review impermissible. The district court characterized the 1975 Review as "unessential" to its decision (Pet. App. 18). The original EIS, though an early specimen of an agency EIS, sufficiently complied with the NEPA without the augmentation provided by the 1975 Review. That Review was not a critical amendment needed to complete the EIS and hence

was not a "supplemental EIS," which remedies deficiencies in the original EIS or analyzes additional proposals and which requires public review and circulation among appropriate agencies. 40 C.F.R. 1500.11(b). Consideration of the Review—to which petitioner had an opportunity to respond (Pet. App. 17-18)—was not improper and did not prejudice petitioner.

Review of these documents by the district court did not make summary disposition improper. As the district court observed, petitioner "had sufficient time to discover and develop evidentiary data" and simply failed to "show sufficient factual particulars to establish that there are genuine issues for trial" (Pet. App. 24).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JAMES W. MOORMAN,
Assistant Attorney General.

JACQUES B. GELIN,
MARYANN WALSH,
Attorneys.

NOVEMBER 1977.

DOJ-1977-11